

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

October 26, 2007

CDUP Exp. Date: December 31, 2020

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Enforcement Action Regarding Breach of Conservation District
Use Permit (CDUP) OA-2670 Conditions #10 and #26

**PERMITTEE/
LANDOWNER:** HASEKO (EWA), Inc.
HASEKO (HAWAII), Inc.

LOCATION: Honouliuli, Ewa, Oahu

TMK: Plat (1) 9-1-012

BACKGROUND:

The subject area exists on the south shore of Ewa, Oahu and is part of the Ocean Pointe Master Plan. On April 26, 2000, the Board of Land and Natural Resources (Board) approved the first amended Findings of Fact, Conclusions of Law Decision and Order conditionally granting HASEKO a Conservation District Use Permit to construct a marina entrance channel at Honouliuli, Ewa, Oahu (**Exhibit 1 & 2**). Condition #33 of the CDUP states, "The BLNR shall retain continuing jurisdiction over this permit and in the event of any violation or non-compliance with an aforementioned condition (general or special) the BLNR may revoke this permit or take any appropriate action."

MEMORANDUM OF AGREEMENT (MOA) for the Marina Project

The Department of the Army (DA) U.S. Army Corps of Engineers Permit No. PODCO 2117 dated June 28, 1993, includes a MOA signed by HASEKO, the State of Hawaii State Historic Preservation Officer, the Office of Hawaiian Affairs, the Advisory Council on Historic Preservation and the Army Corps. The MOA is to insure DA Permit compliance with Section 106 of the National Historic Preservation Act.

The MOA notes that the construction of the marina project will have an adverse effect on twenty-one significant historic properties located within the Oneula archaeological district. For archaeological sites preservation and mitigation, the MOA requires the delineation of buffer zones around archeological sites. By documentation dated April 5, 1993, the State Historic Preservation Division noted buffers as 50-feet along the marina waters edge and 100-feet from, "the nearest planned roadway", "the nearest edge of these sites", "elsewhere." This would be for the preserved site noted as 50-80-12-3201, -3202, -3205, -3209, -4277 and -4278 (**Exhibit 3**).

The MOA states, "Buffer zones, such as flagged or fenced areas, establish visual indicator that delineate the outer boundaries of protected resources. When buffers are used at sites designated for both interim preservation and long-term preservation, their purpose is to protect the archaeological sites so that grading and construction will have "no adverse effect" on them."

The MOA describes the Delineation of Buffer Zones as "an establishment of an approved buffer zone around the identified and mapped site perimeters, within which construction activity would not be allowed. The buffer will be staked and construction activity will not be allowed to occur within the buffer zone."

On August 24, 2007, proposed amendments to CDUP OA-2670 were to be brought before the Board, however it was brought to the Board's attention that an archeological site was damaged and a breach of the CDUP's conditions may have occurred. The agenda item was deferred and Staff was instructed to investigate a possible breach of the Memorandum of Agreement pursuant to conditions #10 & #26 of CDUP OA-2670.

Condition #10 states, "The applicant shall comply with all applicable Department of Health Administrative Rules; including the Section 401 Water Quality Certification conditions; **all applicable conditions of the U.S. Army Corps of Engineers Permit No. PODCO 2117** dated June 28, 1993, and applicable conditions of the Unilateral Agreement Declaration for Conditional Zoning."

Condition #26 states, "The applicant **shall comply with the provisions contained in the Memorandum of Agreement (MOA)** among the applicant, the Hawaii State Historic Preservation Division, the U.S. Army Corps of Engineers, the Advisory Council of Historic Preservation, and the Office of Hawaiian Affairs regarding the treatment of historic sites on the project site."

INVESTIGATION

August 22, 2007-The OCCL is in receipt of a correspondence from the Native Hawaiian Legal Corporation (NHLIC) that initiated the investigation. The document requested that the Board take enforcement action regarding violations of the terms of the conservation district use permit before rendering a decision to amend CDUP OA-2670. According to the information, HASEKO's contractor had destroyed two features and damaged two features of Site 3205 on January 30, 2006. The MOA required the delineation of buffer zones around archaeological sites. Included with this correspondence was a document in which the Historic Preservation Division stated on record that a 6E violation had not occurred.

August 28, 2007-Correspondence was sent to HASEKO noting that the OCCL had just become aware of the archeological site damage and requested more information of other potential breaches of the MOA or other instances of disturbances to archeological sites:

September 5, 2007-The OCCL is in receipt of correspondence from HASEKO describing the damage occurrence to site 3205. According to the information, the contractor was under strict orders not to begin work until after the buffer fencing had been installed. For whatever reason, the contractor did not follow these orders. Attached were the Archaeological Site Investigation

and Assessment of Site 3205 that concluded that the mistaken clearing of vegetation with heavy machinery had caused damage to Site 3205. Two of the twenty-six features of the site had been destroyed and two other features were damaged. A pavement and piled mound interpreted to be temporary habitations were destroyed (**Exhibit 4, 5, 6 & 7**).

An additional occurrence of damage occurred in March 2007, when another contractor that was drilling an anchialine shrimp-monitoring hole near the wetland area inadvertently clipped the edge of an archeological feature while turning his bulldozer around. The feature that was disturbed was identified as a "bulldozer push pile." This appears to have occurred in Archeological Preserve Site #3201.

September 13, 2007-Staff conducted a site inspection of the subject sites and found buffer fences in proper place with the exception of sites 3205 and 3201 & 3202.

DISCUSSION:

HASEKO admits to not having buffer fencing up prior to construction work that resulted in damage to historic sites. In addition, Staff notes that an active road utilized for construction work goes through the buffer area of Site 3205 (**Exhibit 8**). The road within the buffer zone of Site 3205 pre-exists the current project. This road is utilized on a daily basis to enter and exit the project site hauling construction material, goods and services. This appears to violate the conditions of the MOA as construction activities should not be taking place within the buffered area.

Although the Historic Preservation Division has stated on record that a 6E violation has not occurred, Staff notes the archaeological preservation sites are the last remnants of past settlements. The Marina project has obliterated other areas of archeological features and sites of the area. The MOA Stipulation 6 states, "If the signatories to this agreement believe that the terms of the agreement cannot be carried out, or that an amendment must be made, that party shall notify the other signatories and request consultation to amend the agreement. The process of amending the agreement shall be the same as that exercised in creating the original agreement."

Therefore Staff recommends that the spirit, integrity and intent of the MOA be upheld and that the MOA be complied with or amended prior to any changes or amendments to CDUP OA-2670. Condition #33 states that the Board retains jurisdiction over this permit and may revoke or take appropriate action in the event of any violation or non-compliance with conditions of the permit.


Staff does not believe that the Board should revoke the permit. Staff believes that the appropriate action in this case (with the understanding that the subject archaeological sites are not within the Conservation District) would be to penalize the permittee in two instances for non-compliance with two conditions of CDUP OA-2670 regarding the MOA.

STAFF RECOMMENDS AS FOLLOWS:

That the Board find the landowner in violation of Conservation District Use Permit OA-2670, and is subject to the following:


1. The landowner violated the provisions of Conservation District Use Permit OA-2670 in two instances by failing to comply with conditions #10 and #26. The alleged is fined a total of \$4,000.00 for two Conservation District Use Permit violations;
2. The landowner is fined an additional \$500.00 for administrative costs associated with the subject violations;
3. The landowner shall pay all fines (total \$4,500.00) within sixty (60) days of the date of the Board's action;
4. The landowner shall comply with the MOA or amended the MOA to resolve the non-compliance of conditions for CDUP OA-2670;
5. That in the event of failure of the alleged to comply with any order herein, the landowner shall be fined an additional \$2,000.00 per day until the order is complied with; and
6. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted,

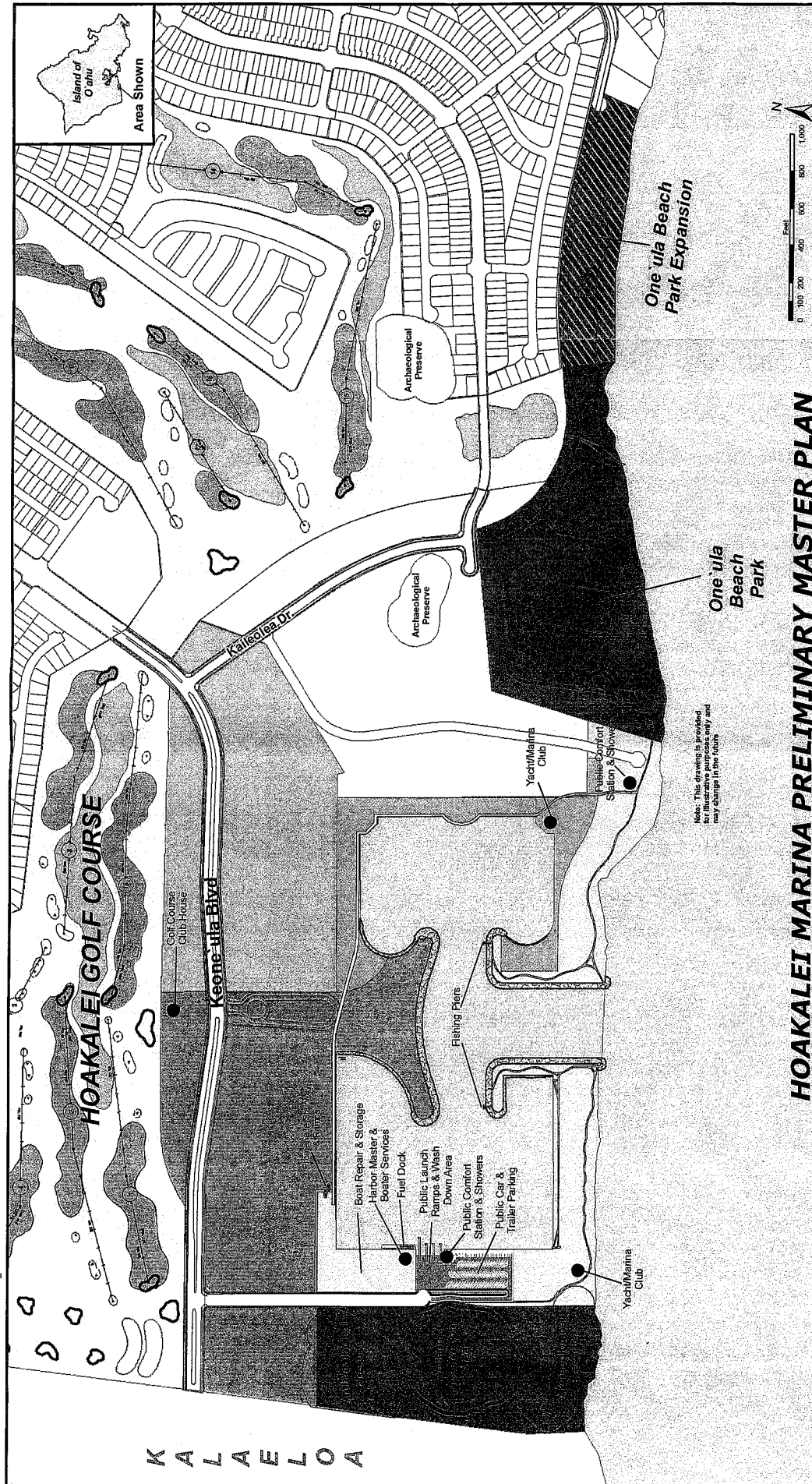


K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:

for 

Laura H. Thielen, Chairperson
Board of Land and Natural Resources



HOAKALEI MARINA PRELIMINARY MASTER PLAN

- | | | | | | | | |
|--|------------|--|-------------------------------|--|--------------------|--|-------------------|
| | Promenade | | Resort | | Golf Course | | Park/Preservation |
| | Revetment | | Maritime Facilities & Parking | | Marina Residential | | |
| | Commercial | | Maritime Non-industrial | | Other Residential | | |

- I. With the conditions imposed by the Board of Land and Natural Resources in its Decision and Order herein, the entrance channel at Honouliuli Ewa, Oahu, is in compliance with the provisions of Chapters 183 and 205, Hawaii Revised Statutes, and Title 13, Chapter 2, Hawaii Administrative Rules.
- J. Any finding of fact herein contained in this decision and order which is determined to be more properly deemed a conclusion of law, is hereby incorporated in this part and made a conclusion of law herein.
- K. Because fishing is a traditional and customary practice of native Hawaiians and others along the shoreline adjoining Haseko's proposed Ewa Marina Project and in the waters where Haseko proposes to build the entrance channel to its proposed marina, Native Hawaiians, including Howell and her family, who engage in such activities are exercising rights "established by Hawaiian usage." § 1-1, H.R.S., see Pele Defense v. Paty, 73 Haw. 578 (1992), and protected under Haw. Const., Art XII, § 7. [SEBO proposed COL 7.]
- L. The BLNR has reviewed the evidence presented at the hearing pertaining to the issue of traditional and customary native Hawaiian rights exercised in the project area including the environmental effects the project will have on those rights. The Board finds that those rights have been sufficiently protected with the issuance of this conditional approval.



IV. DECISION AND ORDER

Based on the Findings of Fact and Conclusions of Law stated herein, IT IS THE DECISION of the Board of Land and Natural Resources to conditionally grant the applicant a Conservation District Use Permit for a marina entrance channel at Honouliuli, Ewa, Oahu, subject to the following conditions:

STANDARD CONDITIONS

1. The applicant shall comply with all applicable statutes, ordinances, rules and regulations of the Federal, State and County governments and applicable parts of Section 13-2-21, Hawaii Administrative Rules, as amended;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury and death arising out of any act or omission of the applicant, its successors, assigns, officers,

employees, contractors and agents under this permit or relating to or connected with the granting of this permit;

3. Since this approval is for use of conservation lands only, the applicant shall obtain appropriate authorizations through the Division of Land Management, State Department of Land and Natural Resources for the disposition of State land[s] in compliance with Chapter 171, HRS;
4. That in issuing this permit, the Department and Board have relied on the information and data which the applicant has provided in connection with the permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
5. That all representation relative to mitigation set forth in the accepted Environmental Impact Statement for this proposed use are hereby incorporated as conditions of this approval;
6. That failure to comply with any of these conditions shall render this Conservation District Land Use application null and void;
7. Other terms and conditions as prescribed by the Chairperson consistent with this Findings of Fact, Conclusions of Law, Decision and Order,
8. That the applicant understands and agrees that this permit does not convey any vested right(s) or exclusive privilege.
9. That the applicant notify the Department in writing when construction activity is initiated and when it is completed.

MODIFIED STANDARD CONDITIONS

10. The applicant shall comply with all applicable Department of Health Administrative Rules; including the Section 401 Water Quality Certification conditions; all applicable conditions of the U.S. Army Corps of Engineers Permit No. PODCO 2117 dated June 28, 1993, and applicable conditions of the Unilateral Agreement Declaration for Conditional Zoning;
11. The applicant shall provide documentation (i.e. book/page or document number) that this approval has been placed in recordable form as part of the deed instrument for TMK: 9-1-12: 6, prior to submission for approval

of construction plans;

12. Before proceeding with any work authorized by the Board, the applicant shall submit four (4) copies of the construction plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three (3) of the copies will be returned to the applicant. The construction plans shall show the alternate public access routes to be used during construction. Plan approval by the Chairperson does not infer approval required of other agencies. Compliance with Condition 1 remains the responsibility of the applicant;
13. The evidence presented herein supports approval of Standard Condition 13-2-21(a), HAR, criteria met under 13-2-21(c)(1-4), HAR: Any work or construction to be done on the land shall be initiated within five years of the approval of such use, and all work and construction must be completed within ten years of the approval of such use;
14. **CONSTRUCTION RELATED**
 - A. The applicant shall provide written advance-notice to the U.S. Coast Guard at least 30 days prior to any dredging or blasting;
 - B. Prior to the submission for approval of construction plans, the applicant shall furnish the Department's Division of Aquatic Resources with a blasting plan for review and approval, if blasting is deemed necessary;
 - C. Existing public access to and along the shoreline shall not be restricted during construction except as necessary to ensure safety. (p. 40 CDUA, p. VI-3 FEIS) In the event that public access is restricted, the applicant shall provide alternate public access routes;
 - D. The applicant shall leave a berm along the shoreline separating the marina entrance channel and the marina itself. The berm shall remain in place until the entire marina is completed before being removed;
 - E. During construction, fishing along the seaward shoreline shall remain open as long as possible. The shoreline berm separating the marina from the ocean shall be wide enough to accommodate both construction operations and public access for fishing;

- F. Prior to connecting the marina waterways to the ocean, the applicant shall remove the collected silt and sediment within the marina;
- G. The applicant shall implement erosion control measures during construction, such as silt curtains;
- H. If applicable, the applicant shall construct the causeway or trestle within the channel boundaries;
- I. Disposal of excavated material shall be in compliance with the U.S. Corps of Engineers Department of the Army Permit;

15. **PUBLIC ACCESS/FACILITIES RELATED**

- A. Prior to breaching the shoreline to connect the marina with the ocean, the applicant shall construct piers that provide public fishing access along the banks of the marina. The piers shall be designed to accommodate the physically challenged;
- B. Should the applicant convey to the City and County of Honolulu (City) the approximate nine acres of beachfront land adjacent to Oneula Beach Park identified in the City's Ordinance 93-94 ("Unilateral Agreement and Declaration for Conditional Zoning") that prior to breaching the shoreline to connect the marina with the ocean, the applicant shall implement the "Oneula Improvements;"
- C. To protect the traditional and customary rights exercised in the project area, during construction of the marina, access to the shoreline fronting the project area must be permitted for the reasonable exercise of traditional and customary practices of native Hawaiians to the extent feasible and safe;
- D. After completion of the project, the applicant will provide, in addition to any other access for traditional and customary practices that may be established in any subsequent or future proceeding or by agreement, public access for the purpose of permitting the reasonable exercise of traditional and customary practices of native Hawaiians, to include the following:
 - 1. Dedication of approximately nine acres of beachfront land adjacent to Oneula Beach Park identified in the City's Ordinance 93-94 ("Unilateral Agreement and Declaration

for Conditional Zoning"), or alternatively, dedication to a perpendicular access to the shoreline which shall be no closer than 600 feet from the eastern boundary of Oneula Beach Park;

2. Dedication of the boat launching complex to the State of Hawaii as set forth in paragraph 15.F., below; and
3. Shoreline access on either side of the marina entrance channel as set forth in paragraph 15.G., below.

- E. The applicant shall make at least fifty percent of the boat slips available to the general public at reasonable market rates;
- F. The boat launching ramp complex shall be completed in a timely manner following breakout to the ocean. The applicant shall dedicate the launching ramp complex to the State of Hawaii. The launching ramp complex shall be operated and maintained by the State or others as a State launching facility. Subject to applicable laws, the State may at any time enter into a joint venture or operating contract with the Applicant for the operation and maintenance of the boat launching ramp complex as a State launching facility. In addition to the seven launching ramps, the launching ramp complex shall include: about 150 associated trailer parking, public parking, boat wash down areas, restrooms and outside showers. The launching ramp complex shall be open and available 24 hours a day;
- G. The applicant shall provide shoreline access with nearby restrooms, showers, and parking areas free-of-charge on each side of the channel;
- H. The applicant shall provide public access to and around the entire marina facilities through a series of internal vehicular, bicycle and pedestrian ways. The pedestrian pathway around the edge of the marina shall be open and available to the public free of charge at all times, excepting during the actual construction of the project and upon a determination by the Department or other governmental agency that if it is unsafe to permit public access to that area;
- I. The applicant shall provide well-signed and lit public pedestrian access around the edge of the marina; including a provision for diverting pedestrian access around certain facilities, such as boat

- haul-out or repair facilities, where heavy equipment operation may pose a safety hazard;
- J. The marina waterway shall be open free of charge to navigational access by the general public in perpetuity;
- K. The applicant shall provide sewage pump-out facilities for boats using the marina;

16. MONITORING REPORT

- A. The applicant shall submit to the Department's Division of Aquatic Resources all monitoring reports for water quality turtle, marine resources inventory, etc.;
- B. The applicant shall conduct an additional marine biota survey three years following the breakthrough connecting the channel with the marina basin and submit the results to the Department. The survey shall be conducted along the same transects used to establish baseline data prior to construction;

OTHER/GENERAL

- 17. The applicant shall construct and maintain for a specified period of time as determined by the Department, an artificial reef subject to review and approval by the Department. Prior to the construction of an artificial reef, the applicant shall apply for, and obtain a Conservation District Use Permit;
- 18. The applicant shall be responsible for the maintenance dredging of the entrance channel to its approved depth and in accordance with the U.S. Corps of Engineers' Department of the Army Permit;
- 19. The applicant shall notify the U.S. Coast Guard of its intention for marking the entrance channel and marina with navigational aids;
- 20. The applicant shall obtain appropriate approval from the Commission on Water Resource Management relative to the caprock aquifer issues;
- 21. The applicant shall be responsible for removing any noxious aggregations of algae washed up along the shoreline fronting the applicant's property;
- 22. The applicant shall provide fully developed and Government approved plans for constructing a flood drainage system through the marina

development in concert with the drainage plans for the upper development of Kapolei, Ewa Villages, other developments in the Kaloi Gulch watershed;

23. The applicant shall submit a comprehensive Maintenance and Management Plan for the Marina and its operations to the Department for review and approval prior to opening the marina for vessel use. The plan should be designed to protect water quality of the marina and ocean waters, among other things, and shall include, but not be limited to the following:
- Elements identified on pages 11, 12, and 41 in the permit application;
 - Enforcement;
 - Responsibilities for compliance of the plan clearly defined;
 - Procedures for coordinating with the U.S. Customs, the U.S. and State Department of Agriculture, the Department of Health and other federal and state agencies having an interest in processing foreign arrivals;
24. Prior to the submission for approval of construction plans, the applicant shall submit a site plan of the marina area to the Department for review and approval. The site plan shall include, but not be limited to the following information:
- The location of the artificial reef;
 - Identify areas around the both sides of the marina entrance and periphery of the marina that will be open to the general public (including the physically challenged) for fishing. Identification should include: specific areas or number of areas and fishing piers, a description of these areas (i.e. entrance channel boundaries, open spaces, etc.), and distances to these fishing areas from planned parking areas;
 - Oneula Beach Park and the nine-acre expansion area;
 - Identify the setback areas required by the City Council's Resolution 93-286 granting a Special Management Area Use Permit and Shoreline Set Back Variance, Ordinance No. 93-94 Unilateral Agreement and Declaration for Conditional

Zoning, and the Urban Design Plan approved by the Department of Land Utilization;

- **Public boat slips;**
- **Launching ramp complex;**
- **Sewage pumpout facilities;**
- **Public access (pedestrian, bicycle, and vehicular) to and around the edge of the marina, signs, and lighting;**
- **Public parking, restrooms and showers;**

- 25. Live-boards shall be prohibited in the Marina;**
- 26. The applicant shall comply with the provisions contained in the Memorandum of Agreement (MOA) among the applicant, the Hawaii State Historic Preservation Division, the U.S. Army Corps of Engineers, the Advisory Council of Historic Preservation, and the Office of Hawaiian Affairs regarding the treatment of historic sites on the project site;**
- 27. The applicant shall submit a copy of the "Best Management Practices" plan required by the State Department of Health pursuant to Section 401 Water Quality Certification to the Department for review and comment;**
- 28. To the extent practicable, the applicant shall preserve native strand vegetation and/or use xeriphetic native plant species for landscaping of coastal areas;**
- 29. The applicant shall provide educational information on the safe use of marinas and pollution control, in the form of brochures, signs, video, and posters;**
- 30. The applicant shall submit an annual report to the Department which shall include the status of compliance of the permit conditions and implementation of the land use;**
- 31. That the Board reserves the right to amend these conditions and the right to stop work should any unanticipated and/or unreasonable adverse ecological results occur;**
- 32. Implementation of the project shall be in general conformity with the representations made in the application on file with the Department and**

at the contested case hearing. Any substantial change in the size or nature of the marina as determined by the Department shall require an amendment to the permit. Any change that the Department determines to be incidental, shall be permitted upon review and approval of the Chairperson.

- 33. The BLNR shall retain continuing jurisdiction over this permit and in the event of any violation or non-compliance with an aforementioned condition (general or special) the BLNR may revoke this permit or take any appropriate action.**

DATED: APR 26 2000



TIMOTHY E. JOHNS

**Chairperson, Board of Land and
Natural Resources**

RECUSED

LYNN P. McCRORY

**Member, Board of Land and
Natural Resources**



WILLIAM KENNISON

**Member, Board of Land and
Natural Resources**

**DID NOT PARTICIPATE IN
FURTHER HEARINGS**

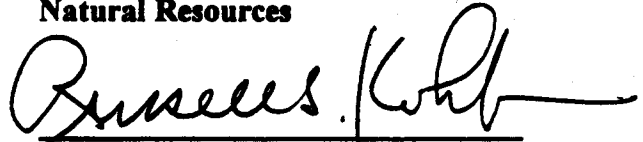
COLBERT M. MATSUMOTO

**Member, Board of Land and
Natural Resources**



KATHRYN WHANG INOUE

**Member, Board of Land and
Natural Resources**





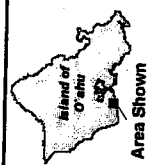
RUSSELL S. KOKUBUN


**Member, Board of Land and
Natural Resources**


EXHIBIT 3

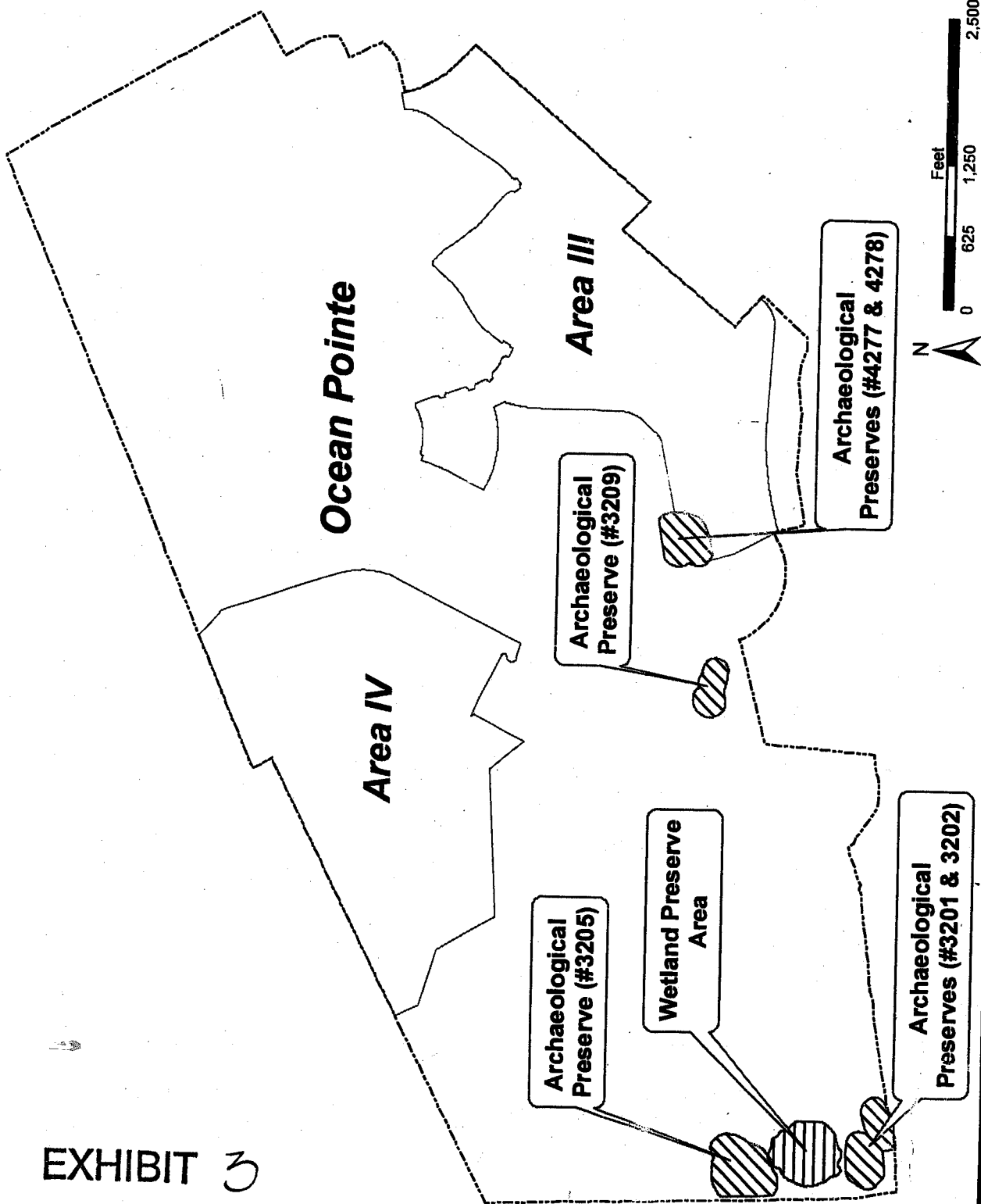
OCEAN POINTE Areas III & IV & Preservation Areas

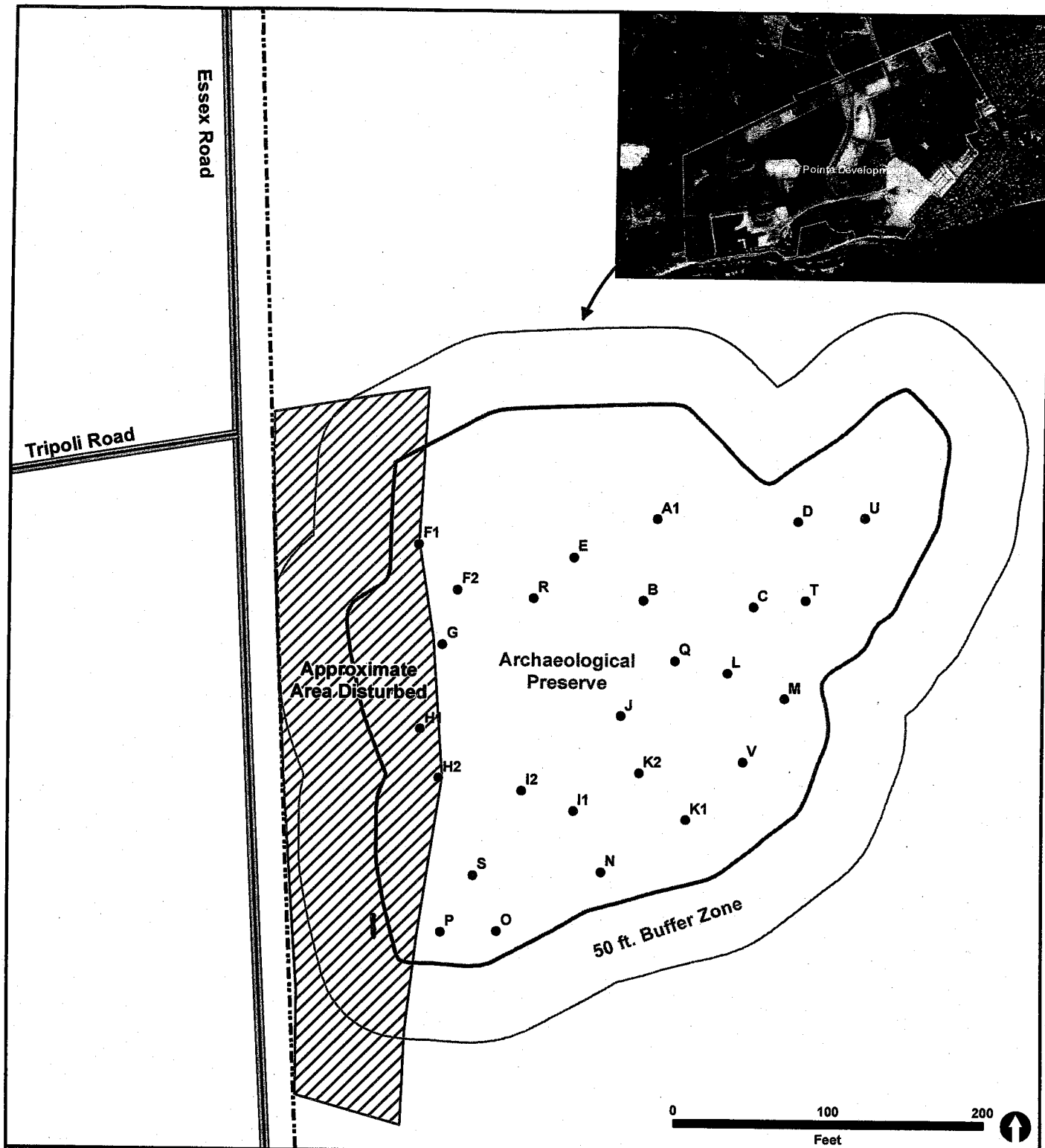
Legend
 Arch. Preserve
 Wetland Preserve



Prepared by

 Area Shown

Drawn by

 HASEKO EWA, INC.







Prepared For:
HASEKO Hawaii, Inc.

Prepared By:
 **PLANNING SOLUTIONS**

Sources:
 -HASEKO Hawaii, Inc.
 -Final Report Phase II: Data Recovery
 Archaeological Mitigation Program
 Ewa Marina Community Project (1508-100395)
 -Space Imaging, Inc.
 (2005-12-31)

Legend:

- Site 3205 Archaeological Feature
-  Ocean Pointe Property Boundary & Fenceline
-  Roadway

Enclosure:

**Approximate
Area of Disturbance
to Archaeological
Site 3205**

Ocean Pointe Marina Project

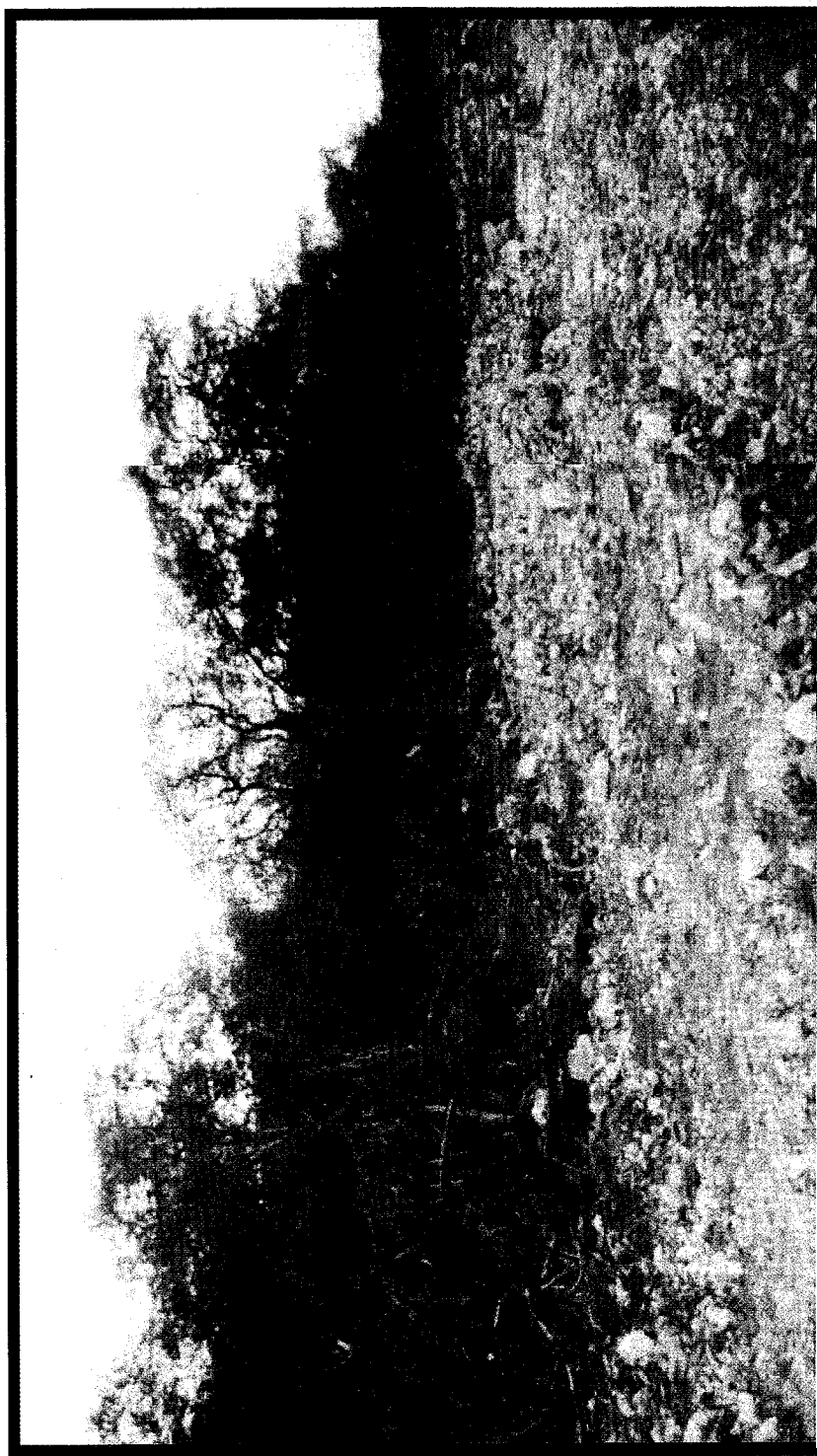


Figure 3. Vegetation clearing on western edge of archaeological preserve near features F, G, and H of site 50-80-12-3205. View to south.

Before



22

www.soest.hawaii.edu/coasts/data/oahu/aerial2005/ftt33.php 12/30/2005

EXHIBIT 6

OCEAN
POINTE
ARCHEOLOGICAL
SITE
3205

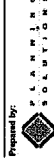
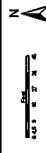
Arch.
Features

After

Note: This drawing is provided
for illustrative purposes only and
may change in the future.



Area Shown



OCEAN POINTE
HASEKO EWA, INC.



100-foot
Buffer

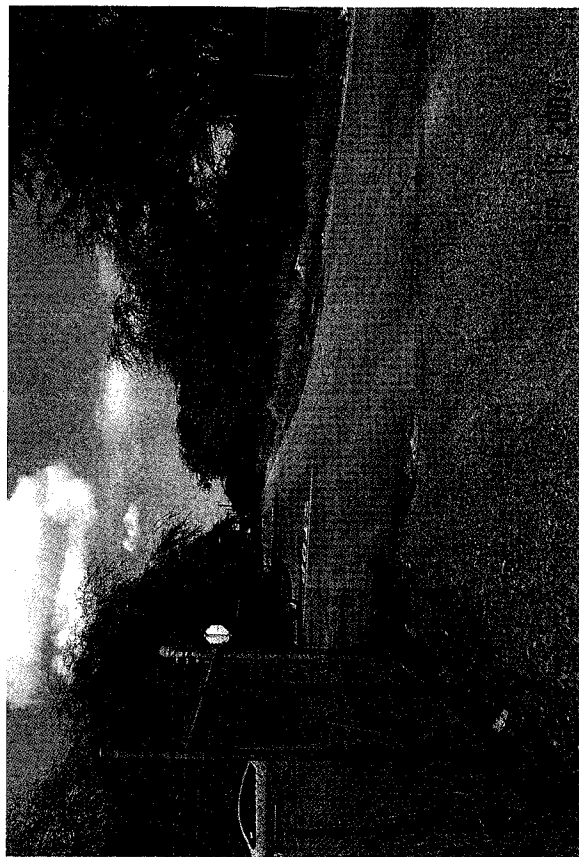
Site Inspection Honouliuli, Ewa, Oahu, Plat (1) 9-1-012:



Facing South (makai). Roadway with Archaeological Preserve #3205 behind the fence.



Facing East. Roadway within the 100-foot buffered area of Archaeological Preserve #3205.



Facing Tripoli Road (west). Entrance into HASEKO site within the 100-foot buffered area of Archaeological Preserve #3205.



The area that was compromised is on the other side of the fence.